adopt more stringent controls on communicative materials available to youths than on those available to adults. See, *e. g.*, *Ginsberg* v. *New York*, 390 U. S. 629 (1968). Nevertheless, minors are entitled to a significant measure of First Amendment protection, see *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969), and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them. See, *e. g.*, *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U. S. 676 (1968); *Rabeck* v. *New York*, 391 U. S. 462 (1968).

In this case, assuming the ordinance is aimed at prohibiting youths from viewing the films, the restriction is broader than permissible. The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing *any* uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach. Clearly all nudity cannot be deemed obscene even as to minors. See *Ginsberg* v. *New York*, *supra*.[10] Nor can such a broad restriction be justified by any other governmental interest

[10] In *Ginsberg* the Court adopted a variation of the adult obscenity standards enunciated in *Roth* v. *United States*, 354 U. S. 476 (1957), and *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966) (plurality opinion). In *Miller* v. *California*, *supra*, we abandoned the *Roth-Memoirs* test for judging obscenity with respect to adults. We have not had occasion to decide what effect *Miller* will have on the *Ginsberg* formulation. It is clear, however, that under any test of obscenity as to minors not all nudity would be proscribed. Rather, to be obscene "such expression must be, in some significant way, erotic." *Cohen* v. *California*, 403 U. S., at 20. See *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 106-107 (1973) (BRENNAN, J., dissenting).

pertaining to minors. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances,[11] the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors. See *Tinker* v. *Des Moines Independent Community School Dist., supra.* Cf. *West Virginia Bd. of Educ.* v. *Barnette,* 319 U. S. 624 (1943). Thus, if Jacksonville's ordinance is intended to regulate expression accessible to minors it is overbroad in its proscription.[12]

C

At oral argument appellee, for the first time, sought to justify its ordinance as a traffic regulation. It claimed that nudity on a drive-in movie screen distracts passing motorists, thus slowing the flow of traffic and increasing the likelihood of accidents.

Nothing in the record or in the text of the ordinance suggests that it is aimed at traffic regulation. Indeed, the ordinance applies to movie screens visible from public places as well as public streets, thus indicating that it is not a traffic regulation. But even if this were the purpose of the ordinance, it nonetheless would be invalid.

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[11] The First Amendment rights of minors are not "co-extensive with those of adults." *Tinker* v. *Des Moines Independent Community School Dist.,* 393 U. S., at 515 (STEWART, J., concurring). "[A] state may permissibly determine that at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Ginsberg* v. *New York,* 390 U. S., at 649–650 (STEWART, J., concurring). In assessing whether a minor has the requisite capacity for individual choice the age of the minor is a significant factor. See *Rowan* v. *Post Office Dept.,* 397 U. S., at 741 (BRENNAN, J., concurring).

[12] See Part III, *infra.*

By singling out movies containing even the most fleeting and innocent glimpses of nudity the legislative classification is strikingly underinclusive. There is no reason to think that a wide variety of other scenes in the customary screen diet, ranging from soap opera to violence, would be any less distracting to the passing motorist.

This Court frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it. See, *e. g.*, *Williams* v. *Lee Optical, Inc.*, 348 U. S. 483, 488–489 (1955). This presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago* v. *Mosley*, 408 U. S., at 95. Thus, "under the Equal Protection Clause, not to mention the First Amendment itself," *id.*, at 96, even a traffic regulation cannot discriminate on the basis of content unless there are clear reasons for the distinctions. See also *Cox* v. *Louisiana*, 379 U. S., at 581 (opinion of Black, J.). Cf. *Williams* v. *Rhodes*, 393 U. S. 23 (1969); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969).

Appellee offers no justification, nor are we aware of any, for distinguishing movies containing nudity from all other movies in a regulation designed to protect traffic. Absent such a justification, the ordinance cannot be salvaged by this rationale.[13]

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[13] This is not to say that a narrowly drawn nondiscriminatory traffic regulation requiring screening of drive-in movie theaters from the view of motorists would not be a reasonable exercise of police power. See *Police Dept. of Chicago* v. *Mosley*, 408 U. S., at 98, and cases cited.

III

Even though none of the reasons advanced by appellee will sustain the Jacksonville ordinance, it remains for us to decide whether the ordinance should be invalidated on its face. This Court has long recognized that a demonstrably overbroad statute or ordinance may deter the legitimate exercise of First Amendment rights. Nonetheless, when considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program. In accommodating these competing interests the Court has held that a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts, see *Dombrowski* v. *Pfister*, 380 U. S. 479, 497 (1965), and its deterrent effect on legitimate expression is both real and substantial. See *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612–615 (1973). See generally Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970).

In the present case the possibility of a limiting construction appears remote. Appellee explicitly joined in this test of the facial validity of its ordinance by agreeing to stay appellant's prosecution.[14] Moreover, the ordinance by its plain terms is not easily susceptible to a narrowing construction.[15] Indeed, when the state courts

[14] In this respect the present case arises in a posture that differs from most challenges to a statute or ordinance considered by this Court. Typically in such cases the issue arises in a context where the statute or ordinance has been applied to allegedly unprotected activity. Thus, we are able to consider the constitutionality of the statute "as applied" as well as "on its face."

[15] The only narrowing construction which occurs to us would be to limit the ordinance to movies that are obscene as to minors. Neither appellee nor the Florida courts have suggested such a

were presented with this overbreadth challenge they made no effort to restrict its application. Compare *Coates* v. *City of Cincinnati*, 402 U. S. 611, 612–613 (1971), and *Brandenburg* v. *Ohio*, 395 U. S. 444, 448–449 (1969), with *Cox* v. *New Hampshire*, 312 U. S. 569, 575–576 (1941), and *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572–573 (1942). In these circumstances, particularly where as here appellee offers several distinct justifications for the ordinance in its broadest terms, there is no reason to assume that the ordinance can or will be decisively narrowed. See *Gooding* v. *Wilson*, 405 U. S. 518, 520–527 (1972). Cf. *Grayned* v. *City of Rockford*, 408 U. S. 104, 111–112 (1972); *Time, Inc.* v. *Hill*, 385 U. S. 374, 397 (1967).

Moreover, the deterrent effect of this ordinance is both real and substantial. Since it applies specifically to all persons employed by or connected with drive-in theaters, the owners and operators of these theaters are faced with an unwelcome choice: to avoid prosecution of themselves and their employees they must either restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable.[16] Cf. *Lake Carriers' Assn.* v. *MacMullan*, 406 U. S. 498, 513 (POWELL, J., dissenting).

IV

In concluding that this ordinance is invalid we do not deprecate the legitimate interests asserted by the city of Jacksonville. We hold only that the present ordinance

limitation, perhaps because a rewriting of the ordinance would be necessary to reach that result.

[16] In this case appellant himself is a theater manager. Hence the statute's deterrent effect acts upon him personally; he is not seeking to raise the hypothetical rights of others. See *Breard* v. *Alexandria*, 341 U. S. 622, 641 (1951).

does not satisfy the rigorous constitutional standards that apply when government attempts to regulate expression. Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential. These prerequisites are absent here. Accordingly the judgment below is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 73–1942

Richard Erznoznik, etc., Appellant, v. City of Jacksonville. | On Appeal from the District Court of Appeal of Florida for the First District.

[June 23, 1975]

MR. JUSTICE DOUGLAS, concurring.

I join wholeheartedly in the Court's view that the ordinance in issue here is fatally overinclusive in some respects and fatally underinclusive in others. I do not doubt that under proper circumstances, a narrowly drawn ordinance could be utilized within constitutional boundaries to protect the interests of captive audiences [1] or to promote highway safety. In these days of heavy traffic, it is reasonable to attempt to remove all distractions that might increase accidents. These legitimate interests cannot, however, justify attempts to discriminate among movies on the basis of their content—a "pure" movie is apt to be just as distracting to drivers as an "impure" one, and to be just as intrusive upon the privacy of an unwilling but captive audience. Any ordinance which regulates movies on the basis of content, whether by an obscenity standard [2] or by some other criterion, impermissibly intrudes upon the free speech rights guaranteed by the First and Fourteenth Amendments.

[1] See *Lehman* v. *City of Shaker Heights*, 418 U. S. 298, 305 (1974) (DOUGLAS, J., concurring in judgment); *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 467 (1952) (DOUGLAS, J., dissenting).

[2] I adhere to my view that any state or federal regulation of obscenity is prohibited by the Constitution. *Roth* v. *United States*, 354 U. S. 476, 508–514 (1957); *Miller* v. *California*, 413 U. S. 15, 42–47 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70–73 (1973).

SUPREME COURT OF THE UNITED STATES

No. 73–1942

Richard Erznoznik, etc., Appellant, *v.* City of Jacksonville. | On Appeal from the District Court of Appeal of Florida for the First District.

[June 23, 1975]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE REHNQUIST joins, dissenting.

Although the Court pays lip service to the proposition that "each case ultimately must depend on its own facts," *ante*, at 4, it strikes down Jacksonville City Code § 330.313 by a mechanical application of "general principles" distilled from cases having little to do with either this case or each other. Because I can accept neither that approach nor its result, I dissent.

The Court's analysis seems to begin and end with the sweeping proposition that, regardless of the circumstances, government may not regulate any form of "communicative" activity on the basis of its content. Absent certain "special circumstances," we are told, the burden falls upon the public to ignore offensive materials rather than upon their purveyor to take steps to shield them from public view. In four short sentences, *ante*, at 6–7, the Court concludes that Jacksonville's ordinance does not pass muster under its tests, and therefore strikes it down.

None of the cases upon which the Court relies remotely implies that the Court ever intended to establish inexorable limitations upon state power in this area. Many cases upheld the regulation of communicative activity and did not purport to define the limits of the power to

do so. *E. g., Lehman* v. *City of Shaker Heights,* 418 U. S. 298 (1974); *Rowan* v. *Post Office Dept.,* 397 U. S. 728 (1970); *Beard* v. *Alexandria,* 341 U. S. 622 (1951); *Kovacs* v. *Cooper,* 336 U. S. 77 (1949). Other cases relied upon by the Court were either expressly or impliedly decided upon equal protection grounds and, although recognizing that First Amendment interests were involved, turned upon "the crucial question . . . whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92, 95 (1972). See also *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953). Such a standard necessarily requires particularized review. Finally, yet other of the cases cited by the Court were decided on vagueness and overbreadth. *E. g., Cox* v. *Louisiana,* 379 U. S. 536 (1965). Again, application of these doctrines requires scrutiny of the specific statute and activity involved rather than reliance upon generalizations. See, *e. g.,* 379 U. S., at 544–558.

In short, nothing in this Court's prior decisions justifies disregard of the admonition that "the nature of the forum and the conflicting interests have remained important in determining the degree of protection afforded by the [First] Amendment to the speech in question." *Lehman* v. *City of Shaker Heights,* 418 U. S. 298, 302–303 (1974) (plurality opinion of MR. JUSTICE BLACKMUN). Rather, in applying this principle in contexts similar to the instant case, members of this Court have cautioned that every medium of communication "is a law unto itself," *Kovacs* v. *Cooper,* 336 U. S. 77, 97 (1949) (opinion of Mr. Justice Jackson), and that the "tyranny of absolutes" should not be relied upon "to meet the problems generated by the need to accommodate the diverse interests affected by the motion pictures in compact modern communities." *Joseph Burstyn, Inc.* v. *Wilson,*

343 U. S. 495, 518 (1952) (opinion of Mr. Justice Frankfurter).

A careful consideration of the diverse interests involved in this case illustrates, for me, the inadequacy of the Court's rigidly simplistic approach. In the first place, the conclusion that only a limited interest of persons on the public streets is at stake here can be supported only if one completely ignores the unique visual medium to which the Jacksonville ordinance is directed. Whatever validity the notion that passersby may protect their sensibilities by averting their eyes may have when applied to words printed on an individual's jacket, see *Cohen* v. *California*, 403 U. S. 15 (1971), or a flag hung from a second-floor apartment window, see *Spence* v. *Washington*, 418 U. S. 405 (1974), it distorts reality to apply that notion to the outsize screen of a drive-in movie theater. Such screens are invariably huge;[1] indeed, photographs included in the record of this case show that the screen of petitioner's theater dominated the view from public places including nearby residences and adjacent highways. Moreover, when films are projected on such screens the combination of color and animation against a necessarily dark background is designed to, and results in, attracting and holding the attention of all observers. See Note, Motion Pictures and the First Amendment, 60 Yale L. J. 696, 707–708 (1951). Similar considerations led Mr. Justice Brandeis, writing for the Court in *Packer Corp.* v. *Utah*, 285 U. S. 105 (1932), to conclude that there is a public interest in regulating billboard displays which may not apply to other forms of advertising:

"'Advertisements of this sort are constantly be-

[1] For example, in a case similar to this one the screen measured 35 feet by 70 feet and stood 54 feet above the ground. *Bloss* v. *Paris Township*, 380 Mich. 466, 157 N. W. 2d 260 (1968).

> fore the eyes of observers on the streets and in street cars without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. The radio can be turned off, but not so the billboard or street car placard. These distinctions clearly place this kind of advertising in a position to be classified so that regulations or prohibitions may be imposed upon all within the class.'" 285 U. S., at 110.

So here, the screen of a drive-in movie theater is a unique type of eye-catching display that can be highly intrusive and distracting. Public authorities have a legitimate interest in regulating such displays under the police power; for example, even though traffic safety may not have been the only target of the ordinance in issue here, I think it not unreasonable for lawmakers to believe that public nudity on a giant screen, visible at night to hundreds of drivers of automobiles, may have a tendency to divert attention from their task and cause accidents.

No more defensible is the Court's conclusion that Jacksonville's ordinance is defective because it regulates only nudity. The significance of this fact is explained only in a footnote:

> "Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. In this respect such nudity is distinguishable from nudity traditionally subject to indecent exposure laws." *Ante*, at 6 n. 7.

Both the analogy and the distinction are flawed. Unlike persons reading books, passersby cannot consider fragments of drive-in movies as a part of the "whole work" for the simple reason that they *see* but do not *hear*

the performance, cf. Note, *supra*, at 707 and n. 27; nor do drivers and passengers on nearby highways see the whole of the visual display. The communicative value of such fleeting exposure falls somewhere in the range of slight to nonexistent. Moreover, those persons who legitimately desire to consider the "work as a whole" are not foreclosed from doing so. The record shows that the film from which appellant's prosecution arose was exhibited in several indoor theaters in the Jacksonville area. And the owner of a drive-in movie theater is not prevented from exhibiting nonobscene films involving nudity so long as he effectively shields the screen from public view. Thus, regardless of whether the ordinance involved here can be loosely described as regulating the content of a certain type of display, it is not a restriction of any "message." Cf. *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95–96 (1972); *Grayned* v. *City of Rockford*, 408 U. S. 104, 115 (1972). The First Amendment interests involved in this case are trivial at best.

On the other hand, assuming *arguendo* that there could be a play performed in a theater by nude actors involving genuine communication of ideas, the same conduct in a public park or street could be prosecuted under an ordinance prohibiting indecent exposure. This is so because the police power has long been interpreted to authorize the regulation of nudity in areas to which all members of the public have access, regardless of any incidental effect upon communication. A nudist colony, for example, cannot lawfully set up shop in Central Park or Lafayette Park, places established for the public generally. Cf. *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 67 (1973); *Roth* v. *United States*, 354 U. S. 476, 512 (1957) (DOUGLAS, J., dissenting). Whether such regulation is justified as necessary to protect public mores or simply to insure the undistracted enjoyment of open

areas by the greatest number of people—or for traffic safety—its rationale applies *a fortiori* to giant displays which through technology are capable of revealing and emphasizing the most intimate details of human anatomy.

In sum, the Jacksonville ordinance involved in this case, although no model of draftsmanship, is narrowly drawn to regulate only certain unique public exhibitions of nudity; it would be absurd to suggest that it operates to suppress expression of *ideas*. By conveniently ignoring these facts and deciding the case on the basis of absolutes the Court adds nothing to First Amendment analysis and sacrifices legitimate state interests. I would affirm the judgment of the Florida Court of Appeals.[2]

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[2] On my view of this case it is not necessary to deal with the issues discussed in Parts II B, II C, and III of the Court's opinion.

SUPREME COURT OF THE UNITED STATES

No. 73–1942

Richard Erznoznik, etc., Appellant, *v.* City of Jacksonville. | On Appeal from the District Court of Appeal of Florida for the First District.

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MR. JUSTICE WHITE, dissenting.

The Court asserts that the State may shield the public from selected types of speech and allegedly expressive conduct, such as nudity, only when the speaker or actor invades the privacy of the home or where the degree of captivity of an unwilling listener is such that it is impractical for him to avoid the exposure by averting his eyes. The Court concludes: "that the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content." *Ante*, p. —. If this broadside is to be taken literally, the State may not forbid "expressive" nudity on the public streets, in the public parks or any other public place since other persons in those places at that time have a "limited privacy interest" and may merely look the other way.

I am not ready to take this step with the Court. Moreover, by the Court's own analysis, the step is an unnecessary one. If, as the Court holds in Part II B of its opinion, the ordinance is unconstitutionally overbroad even as an exercise of the police power to protect children, it is fatally overbroad as to the population generally. Part II A is surplusage. I therefore dissent.